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## Raich v. Ashcroft: Medical Marijuana and the Revival of Federalism

Samantha Everett

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# ***Raich v. Ashcroft*: Medical Marijuana and the Revival of Federalism**

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## I. INTRODUCTION

“In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.”<sup>1</sup>

Angel Raich suffers from an inoperable brain tumor, seizures, life-threatening weight loss, and chronic pain. Without proper treatment she will die. Diane Monson suffers from a degenerative spinal disease that causes severe chronic pain and muscle spasms. Both women have tried essentially all methods of treatment, and both suffered greatly, while

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1. United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

nothing relieved their pain.<sup>2</sup> Luckily, the women and tens of thousands of others like them live in California,<sup>3</sup> and their fellow Californians legalized a solution in 1996: marijuana.<sup>4</sup> Faced with the possibility that only marijuana could provide relief for a variety of serious illnesses, the people of California enacted the Compassionate Use Act of 1996 (Compassionate Use Act), which recognizes a right to obtain marijuana for medical treatment.<sup>5</sup>

Since 1996, nine states have passed legislation that flies directly in the face of the federal government's "war on drugs," as embodied in the federal Controlled Substances Act (CSA).<sup>6</sup> The CSA ranks marijuana as one of the most noxious controlled substances, placing it in the same category as substances such as heroin.<sup>7</sup> However, voters in Alaska, Arizona, California, Colorado, Hawaii, Maine, Nevada, Oregon, and Washington have authorized doctors to recommend, and patients to possess and use marijuana for the treatment of many debilitating illnesses.<sup>8</sup> Despite the clear will of the voters in these states, the federal

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2. *Raich v. Ashcroft*, 248 F. Supp. 2d 918, 920–21 (N.D. Cal. 2003) (*Raich I*), *rev'd*, 352 F.3d 1222 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 2909 (2004). According to the district court, "[t]raditional medicine has utterly failed these women; none of the treatments, prescription medications, or other interventions attempted by them and their physicians has proven effective. . . . The only thing that has provided any relief from symptoms and/or improvement in their condition is medication with cannabis." *Id.* at 921 (citations omitted).

3. While statistics on the subject are unreliable, the *Los Angeles Times* reports that medical marijuana opponents and proponents agree that there are tens of thousands of people in California alone using marijuana on the recommendation of their physician. Henry Weinstein, *Medical Pot Users Win Key Ruling: The U.S. Can't Prosecute Patients Who Use It on the Advice of a Physician and Obtain the Drug at No Charge, an Appeals Court Panel Rules*, L.A. TIMES, Dec. 17, 2003, at A1.

4. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE §§ 11362.5–.795 (West Supp. 2004). Proponents and opponents of medical marijuana debate the effectiveness of the substance as medicine. *See, e.g.*, NAT'L ORG. FOR REFORM OF MARIJUANA LAWS, EVIDENCE SUPPORTING MARIJUANA'S MEDICAL VALUE, at [http://www.norml.org/index.cfm?Group\\_ID=5441](http://www.norml.org/index.cfm?Group_ID=5441) (2004) (discussing the medical uses of marijuana); OFF. OF NAT'L DRUG CONTROL POL'Y, WHAT AMERICANS NEED TO KNOW ABOUT MARIJUANA, at [http://www.whitehousedrugpolicy.gov/publications/amer\\_know\\_marij](http://www.whitehousedrugpolicy.gov/publications/amer_know_marij) (last updated Feb. 5, 2003) (discussing the risks associated with marijuana use, and maintaining that there is no established medical use for the drug); *see also* Deborah Garner, Note, *Up in Smoke: The Medicinal Marijuana Debate*, 75 N.D. L. Rev. 555, 574–78 (1999) (discussing the various positions in the debate over effectiveness).

5. CAL. HEALTH & SAFETY CODE § 11362.5.

6. Controlled Substances Act, 21 U.S.C. § 812 (2000); *see also* OFF. OF NAT'L DRUG CONTROL POL'Y, THE PRESIDENT'S NAT'L DRUG CONTROL STRATEGY 2004, at <http://www.whitehousedrugpolicy.gov/publications/policy/ndcs04/index.html> (last updated Mar. 29, 2004) (discussing the current plans for the *war on drugs*); *infra* note 8 and accompanying text (enumerating the states that have passed legislation conflicting with the federal Controlled Substances Act).

7. 21 U.S.C. § 812(c) (Schedule I) (2000); *see infra* Part II.B.

8. *See* ALASKA STAT. §§ 11.71.090, 17.37.010–.080 (Michie Supp. 2003); ARIZ. REV. STAT. ANN. § 13-3412.01 (West Supp. 2004); CAL. HEALTH & SAFETY CODE §§

government has continued to enforce the CSA against users and distributors of medical marijuana.<sup>9</sup>

Most recently, the federal government raided the home of Diane Monson in Northern California.<sup>10</sup> After California officials refused to act, determining that her conduct was lawful under California law, federal DEA agents entered her home and seized and destroyed her marijuana plants.<sup>11</sup> Diane Monson and Angel Raich, who feared a similar raid, sued. In *Raich v. Ashcroft*, the Ninth Circuit ruled that the CSA was an unconstitutional exercise of congressional commerce power when applied to citizens who use marijuana that has not traveled interstate and

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11362.5–.795; COLO. CONST. art. XVIII, § 14; HAW. REV. STAT. §§ 329-121 to -128 (Supp. 2003); ME. REV. STAT. ANN. tit. 22, § 2383B(5) (West 2004); NEV. CONST. art. IV, § 38; OR. REV. STAT. § 475.300 (2003); WASH. REV. CODE ANN. § 69.51A.005 (West Supp. 2004). Voters in the District of Columbia also overwhelmingly approved a measure that would legalize medical marijuana. However, even with sixty-nine percent approval, the measure did not become law due to a prohibition on spending any money on the ballot measure. The prohibition had been passed as part of an appropriations bill. Apparently, only \$1.64 was needed in order to pay an employee of the Board of Elections to verify the results with a computer. A judge later ordered the results released. Alistair E. Newbern, Comment, *Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana Use After United States v. Lopez*, 88 CAL. L. REV. 1575, 1578–79 (2000).

9. The federal government has attempted to enforce the CSA on many fronts by taking action against dispensaries, users, and doctors. See, e.g., *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001) (granting motion for permanent injunction against dispenser of medical marijuana under California's Compassionate Use Act); *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003) (*Raich II*) (granting injunction barring the enforcement of CSA against individual medical marijuana users), *cert. granted*, 124 S. Ct. 2909 (2004); *Conant v. Walters*, 309 F.3d 629, 632 (9th Cir. 2002) (upholding injunction barring the enforcement of government policy to punish physicians who prescribe medical marijuana), *cert. denied*, 124 S. Ct. 387 (2003); *County of Santa Cruz v. Ashcroft*, 279 F. Supp. 2d 1192, 1195–97 (N.D. Cal. 2003) (denying motion to enjoin Drug Enforcement Agency (DEA) requiring the government to return confiscated marijuana plants to dispensary after their raid on cooperative). In one telling example, federal DEA agents raided a Santa Cruz cooperative that was providing marijuana within the Compassionate Use Act to severely ill people, most of whom were terminally ill. *County of Santa Cruz*, 279 F. Supp. 2d at 1195–97. In September 2002, between twenty and thirty agents forcibly entered the building, forced the operators to the ground, and attempted to arrest several members of the cooperative that were present. *Id.* at 1197. One member, while several assault rifles were pointed at her, had to explain to the agents that she was unable to put her hands on her head because she was paralyzed. Joel Stein et al., *The New Politics of Pot: Can It Go Legit? How the People Who Brought You Medical Marijuana Have Set Their Sights on Lifting the Ban For Everyone*, TIME, Nov. 4, 2002, at 56, 59–60 (describing the debate over legalization).

10. *Raich I*, 248 F. Supp. 2d 918, 921 (N.D. Cal. 2003), *rev'd*, 352 F.3d 1222 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 2909 (2004).

11. *Id.*

was never intended for interstate or foreign commerce.<sup>12</sup>

In ruling against the extension of Congress's commerce power in *Raich*, the Ninth Circuit continued a line of recent cases in which it ruled to limit the reach of Congress.<sup>13</sup> This Casenote argues that *Raich* was correctly decided and should be upheld by the Supreme Court on appeal.<sup>14</sup> In addition, the judiciary should continue to narrowly interpret the commerce power in order to further the fundamental purpose of our dual system of government: protection of individual rights. More specifically, courts should apply the reasoning of *Raich* and narrowly define the classes of activities involved in Commerce Clause challenges.

Part II of this Casenote provides an overview of the history and current state of Commerce Clause jurisprudence, as well as an analysis of the effectiveness of that jurisprudence and the various ways in which lower courts can apply it. Part III reviews the *Raich* case and the applicable marijuana legislation. Part IV analyzes the *Raich* decision and the other recent Ninth Circuit decisions in light of the Supreme Court's Commerce Clause framework. Finally, Part VI recommends that the Supreme Court affirm *Raich*, and that the federal courts apply the reasoning of *Raich* to other Commerce Clause challenges and narrowly define the class of activity involved in an "as applied" Commerce Clause challenge to a federal statute. A narrow definition is mandated by the Supreme Court and is necessary to protect both individual liberty and the dual system of government intended by the Framers.

## II. THE MARIJUANA DEBATE

The battle lines in the struggle to delineate the proper scope of federal power are clearly drawn in the medical marijuana debate.<sup>15</sup> California's

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12. *Raich II*, 352 F.3d at 1234–35.

13. See *United States v. McCoy*, 323 F.3d 1114, 1115 (9th Cir. 2003) (finding a federal statute prohibiting possession of child pornography to be an unconstitutional exercise of commerce power as applied to a woman in possession of a photograph with no intent to distribute, exchange, or otherwise use for commercial purposes); *United States v. Stewart*, 348 F.3d 1132, 1133–34 (9th Cir. 2003) (holding that a federal statute prohibiting possession of machine guns was an unconstitutional exercise of commerce power as applied to a person in possession of unlawful machine guns and rifle kits when only unusable parts had traveled in interstate commerce).

14. The government's petition for certiorari was granted on June 28, 2004. *Ashcroft v. Raich*, 124 S. Ct. 2909 (2004).

15. While it is outside the scope of this Casenote, it is interesting to note that while limiting federal power has historically been a Republican or *conservative* goal, the medical marijuana issue highlights the fact that a promotion of individual rights may, in fact, allow behavior that many conservatives find immoral or reprehensible. On the other hand, the traditional *liberal* position in support of an expansive federal government leads to encroachment on individual liberties such as the use of medical marijuana. Thus, issues such as medical marijuana cause both groups to face the potential

Compassionate Use Act<sup>16</sup> and the other state laws legalizing medicinal use of marijuana<sup>17</sup> are in direct conflict with the federal CSA.<sup>18</sup> California's law has become the focal point of this battle, and its effectiveness was at issue in *Raich*.<sup>19</sup>

### A. *The Compassionate Use Act*

California voters enacted the Compassionate Use Act by direct initiative in order to ensure that seriously ill individuals have the right to use and possess marijuana for relief of symptoms from cancer, AIDS, arthritis, migraine, and other ailments, as long as such use is recommended by a doctor.<sup>20</sup>

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discrepancies in their respective ideologies. For an interesting discussion of these issues see Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541 (2002).

16. CAL. HEALTH & SAFETY CODE §§ 11362.5–.795 (West Supp. 2004).

17. See *supra* note 8 (listing the state laws currently in force).

18. See *United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086, 1091 (N.D. Cal. 1998) (holding that the CSA reaches the uses of marijuana that are legal under the Compassionate Use Act because the Compassionate Use Act directly conflicts with the CSA). Because of this conflict, the Compassionate Use Act is preempted by the CSA. See *infra* note 43. At least one commentator has argued that the Compassionate Use Act does not, in fact, conflict with the CSA, but rather creates an exception to that law. James D. Abrams, Note, *A Missed Opportunity: Medical Use of Marijuana is Legally Defensible*, 31 CAP. U. L. REV. 883, 910–11 (2003). However, it is unclear how one can logically argue that a state statute that legalizes marijuana in some instances is not directly contrary to a federal statute that makes that same substance illegal in all instances. For purposes of this Casenote, I assume that the laws are in conflict, and that the federal CSA, therefore, preempts California's Compassionate Use Act. See *infra* note 43. Preemption is outside of the scope of this Casenote, as *Raich v. Ashcroft* involves the constitutionality of the federal law. See *infra* Parts III and V.

19. Had the Ninth Circuit affirmed the exertion of federal power in *Raich*, the Compassionate Use Act would only protect Californians against prosecution by state authorities. See *infra* Part II.A. Due to the ambitions of federal authorities, see THE PRESIDENT'S NAT'L DRUG CONTROL STRATEGY 2004, *supra* note 6, this protection alone means very little to an ill person seeking relief without prosecution.

20. The stated purposes of the statute are:

(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

(C) To encourage the federal and state governments to implement a plan to

Although California law prohibits possession or cultivation of marijuana,<sup>21</sup> the Compassionate Use Act creates an exemption for patients (and their primary caregivers)<sup>22</sup> whose doctor has recommended marijuana for medical purposes.<sup>23</sup> It also provides protection for physicians who prescribe or recommend marijuana for medical purposes.<sup>24</sup>

California's Compassionate Use Act has no bearing on federal law,<sup>25</sup> and, as the *Raich* plaintiffs became aware, those who use and possess marijuana for any purpose risk prosecution by federal authorities under the federal CSA.<sup>26</sup>

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provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A)–(C).

21. CAL. HEALTH & SAFETY CODE §§ 11357–11362 (West 1991 & Supp. 2004).

22. “Primary caregiver” is defined as the person who has consistently assumed responsibility for the housing, health, or safety of the patient. CAL. HEALTH & SAFETY CODE § 11362.7(d). To be protected, the primary caregiver must be at least eighteen years old and within one of the three statutory categories. *Id.* § 11362.7(d)(1)–(3), (e).

23. *Id.* § 11362.71(e) (“No person or designated primary caregiver in possession of a valid identification card shall be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana in an amount established pursuant to this article . . .”). California’s State Department of Health Services is charged with establishing and maintaining a program under which it issues identification cards to qualified individuals. *Id.* § 11362.71(a). In addition, each county health department must take part in the administration of the identification card program. *Id.* § 11362.71(b). The identification card system is voluntary; to realize protection under the Compassionate Use Act, a person in possession of marijuana need only show authorities that his or her physician recommended the use of marijuana for treatment. S.B. 420, 2003 Leg., Reg. Sess. (Cal. 2003). The identification card system serves to alleviate confusion, unnecessary expenditure of resources, and inconvenience. In the absence of an identification card, the police are not required to abandon a search when presented with evidence of a physician recommendation. *People v. Fisher*, 117 Cal. Rptr. 2d 838, 840 (Ct. App. 2002). If the person in possession is apprehended, the burden of proving the presence of a physician’s recommendation at hearing or trial is on the defendant. *People v. Jones*, 4 Cal. Rptr. 3d 916, 921–22 (Ct. App. 2003).

24. CAL. HEALTH & SAFETY CODE § 11362.5(c) (“Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.”). The Compassionate Use Act does not preempt federal law in this area. *See infra* note 43. However, in *Conant v. Walters*, the Ninth Circuit enjoined the federal government from revoking physician licenses or investigating California physicians because such investigation and/or revocation of licenses was unconstitutional because it violated the First Amendment guarantee of free speech. 309 F.3d 629, 632 (9th Cir. 2002), *cert. denied*, 124 S. Ct. 387 (2003).

25. *See infra* note 43. This has caused much confusion on the part of state and local law enforcement agencies. *See* Jeff McDonald, *Disparity Clouding Medical Pot Law: Enforcement of ‘96 State Measure Differs Widely*, SAN DIEGO UNION TRIB., Feb. 22, 2004, at B2, B4.

26. Under the current administration, the federal government has intensified efforts to stop marijuana use for medicinal purposes. *See* Alex Kreit, Comment, *The Future of Medical Marijuana: Should the States Grow Their Own?*, 151 U. PA. L. REV. 1787, 1788–800 (2003).

*B. The Federal Controlled Substances Act*

Under the CSA, it is illegal to “manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance,” unless the CSA itself provides otherwise.<sup>27</sup> It is also a crime to possess controlled substances, unless it is within an exception under the CSA.<sup>28</sup>

The CSA is one title of the Comprehensive Drug Abuse Prevention and Control Act, passed in 1970, for the stated purposes of (1) preventing drug abuse and rehabilitating users, (2) providing more effective means of law enforcement, and (3) providing for an “overall balanced scheme” of criminal penalties for drug offenses.<sup>29</sup> Title II, the CSA, lays out the congressional findings that justify the law, including several that bear directly on congressional commerce power.<sup>30</sup> These include findings that most drug traffic flows through interstate and foreign commerce, that local distribution and possession contributes to the interstate traffic, and that federal control of intrastate traffic is necessary to the control of interstate traffic.<sup>31</sup>

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27. 21 U.S.C. § 841(a)(1) (2000).

28. *Id.* § 844(a). The CSA allows possession, with a prescription, of substances in all schedules other than Schedule I. *See id.* § 829. For example, a doctor may prescribe substances listed in Schedule II with the appropriate license. *See Conant*, 309 F.3d at 640 n.1 (Kozinski, J., dissenting) (describing the impact of federal revocation of a doctor’s Schedule II license).

29. COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT, H.R. REP. NO. 91-1444, at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4567.

30. *See infra* Part IV.A.

31. 21 U.S.C. § 801. The relevant part of the statute provides:

(3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because—

(A) after manufacture, many controlled substances are transported in interstate commerce,

(B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and

(C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.

(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate.



The CSA classifies controlled substances into five schedules, with marijuana appearing in the most restrictive Schedule I.<sup>32</sup> Substances are placed in Schedule I if they have a high potential for abuse, no currently accepted medical use in treatment in the United States, and “[t]here is a lack of accepted safety for use of the drug or other substance under medical supervision.”<sup>33</sup>

Despite the legalization of medicinal marijuana in Canada<sup>34</sup> and provision of medical marijuana to a select few by the United States government,<sup>35</sup> the federal government has been steadfastly resistant to the reclassification of marijuana into Schedule II.<sup>36</sup> Placing marijuana into Schedule II would make the drug available with a prescription.<sup>37</sup> This resistance continues to this day,<sup>38</sup> notwithstanding findings by both the United States government<sup>39</sup> and the British House of Lords<sup>40</sup>

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Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.

(6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.

*Id.*

32. 21 U.S.C. § 812(c) (Schedule I). The Attorney General and the Secretary of Health and Human Services have the power to add or remove substances from the Schedules. *Id.* § 811.

33. *Id.* § 812(b)(1)(C). Other Schedule I substances include ketobemidone, diethylthiambutene, and heroin. *Id.* § 812(c) (Schedule I).

34. Marijuana Medical Access Regulations, SOR/2001-227, available at <http://www.canlii.org/ca/regu/sor1-227/sec1%2Ehtml> (regulations allowing cultivation and possession of marijuana for medicinal use); see also *Conant v. Walters*, 309 F.3d 629, 642 (9th Cir. 2002) (Kozinski, J., concurring), *cert. denied*, 124 S. Ct. 387 (2003).

35. See *Conant*, 309 F.3d at 648. The government continues to supply marijuana to individuals who participated in the federal medical marijuana program that existed from 1978 to 1992. *Id.*

36. See Garner, *supra* note 4, at 574–78.

37. Schedule II substances, which are considered to be highly addictive yet have an accepted medical use, 21 U.S.C. § 812 (b)(2)(A)–(B), include morphine, cocaine, amphetamines, and PCP. 21 C.F.R. § 1308.12 (2004). Schedule II substances can be prescribed by doctors in appropriate circumstances. See *supra* note 28.

38. See 21 U.S.C. § 812 (Schedule I). The federal government has not admitted that there may be any medical use for the drug. According to Andrea Barthwell, Deputy Director of the White House Office on National Drug Control Policy, “[t]here is no scientific evidence that qualifies smoked marijuana to be called medicine.” Steve Chapman, *Medical Marijuana Movement Still Stonewalled by Enemies*, BALTIMORE SUN, Mar. 2, 2004, at 13A.

39. INST. OF MED., MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE (Janet E. Joy et al. eds., 1999), available at <http://www.nap.edu/books/0309071550/html>. This report by the National Institute of Medicine of the National Academy of Sciences, commissioned by the White House Officer of National Drug Control Policy, found that “[t]he accumulated data indicate a potential therapeutic value for cannabinoid drugs . . .” *Id.* at 3; see also *Conant*, 309 F.3d at 641–43 (Kozinski, J., concurring).

40. SELECT COMM. ON SCI. & TECH., HOUSE OF LORDS, NINTH REPORT, *Medical Use of Cannabis: Recommendations* 1998, §§ 8.2, 8.3, available at <http://www.publications>.

confirming the potential benefits of the drug. Reclassification is not procedurally problematic, as the CSA provides a procedure for the reclassification or removal of substances.<sup>41</sup>

There have been several attempts to get marijuana reclassified, through both legal and legislative means, but none have been successful.<sup>42</sup> Because of these failed attempts, advocates of medical marijuana have sought to make it available through other means, such as the Compassionate Use Act. However, state laws legalizing marijuana do not protect individuals from federal prosecution under the federal law, because the federal CSA preempts California's Compassionate Use Act under the Supremacy Clause.<sup>43</sup> Thus, California's Compassionate Use Act affords no protection to individuals who are prosecuted by federal authorities for possession or distribution of marijuana. While those prosecuted have put forth several theories under which they should be protected, the only successes have come under the First Amendment,<sup>44</sup> and in *Raich*, under the Commerce Clause.<sup>45</sup>

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parliament.uk/pa/ld199798/ldselect/ldscitech/151/15101.htm recommending that the British government allow doctors to prescribe marijuana); *see also* *Conant*, 309 F.3d at 641–43 (Kozinski, J., concurring).

41. 21 U.S.C. § 811(a).

42. *See, e.g.*, *United States v. Greene*, 892 F.2d 453, 454–56 (6th Cir. 1989) (finding no violation of due process because the placement of marijuana in Section I was not arbitrary and capricious); *United States v. Fogarty*, 692 F.2d 542, 547–48 (8th Cir. 1982) (holding that marijuana's placement in Section I is not irrational in light of ongoing dispute as to physical and psychological effects); *Nat'l Org. for Reform of Marijuana Laws v. Bell*, 488 F. Supp. 123, 134–36 (D.D.C. 1980) (finding no violation of equal protection because classification is rational in light of ongoing debate); *see also* Klein, *supra* note 15, at 1562–63 (discussing unsuccessful legislative efforts to get marijuana reclassified); Garner, *supra* note 4, at 574–78 (discussing reclassification efforts).

43. U.S. CONST. art. VI, cl. 2. The CSA includes specific language regarding congressional intent to preempt state law in case the two conflict, 21 U.S.C. § 903, and they do conflict. *See supra* note 18. Therefore, the CSA expressly preempts the Compassionate Use Act. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (holding that an express statement of preemption is sufficient for federal law to preempt). According to one district court, the Compassionate Use Act does not even attempt to preempt the federal CSA, but rather only exempts the individuals covered by the Compassionate Use Act from enforcement of California laws. *United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086, 1094 (N.D. Cal. 1998), *rev'd*, 190 F.3d 1109 (9th Cir. 1999), *cert. granted*, 531 U.S. 1010 (2000), *rev'd*, 532 U.S. 483 (2001).

44. *Conant*, 309 F.3d at 639. In *Conant*, the federal government promulgated a policy under which doctors were to be prosecuted for recommending or explaining the benefits of marijuana to their patients. The Ninth Circuit upheld an injunction issued to prohibit enforcement of this policy, holding that such enforcement would be an unreasonable restriction on speech. *Id.*

45. *Raich II*, 352 F.3d 1222 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 2909 (2004).

### III. THE *RAICH* DECISION

Two severely ill women, Angel Raich and Diane Monson (plaintiffs) possessed and used marijuana on the direction of their doctors.<sup>46</sup> Monson grew marijuana herself, and two anonymous growers supplied Raich with marijuana at no cost, as she was unable to provide for herself.<sup>47</sup> The marijuana that both plaintiffs used and possessed was grown completely in California and was not sold or distributed. Raich's suppliers allegedly use only soil, water, nutrients, equipment, and supplies originating in California.<sup>48</sup> In August of 2002, agents of the Butte County Sheriff's Department and the federal Drug Enforcement Agency (DEA) raided plaintiff Monson's home. While the sheriffs refused to seize Monson's marijuana plants after they determined that her use was legal under California's Compassionate Use Act, the DEA did seize and destroy the plants as a violation of the federal CSA.<sup>49</sup> Neither Raich's home nor those of her caretakers were raided, but they feared that a raid was likely without a court's intervention.<sup>50</sup> Plaintiffs brought suit seeking an injunction against further enforcement of the CSA and a declaration that the CSA is unconstitutional as applied to those Californians possessing and using marijuana for medicinal purposes.<sup>51</sup>

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The Supreme Court struck down the use of the *medical necessity* defense in *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 498–99 (2001). Defenses based on the Commerce Clause, the Fifth, Ninth, and Tenth Amendments, and the protection of freedom of speech under the First Amendment have all been asserted. See *Conant*, 309 F.3d 629, 630 (involving a challenge based on First Amendment right to free speech); *Raich II*, 352 F.3d at 1227 (involving a challenge based on the Commerce Clause, the Ninth and Tenth Amendments, and a medical necessity defense); *County of Santa Cruz v. Ashcroft*, 279 F. Supp. 2d 1192, 1201, 1205, 1209 (N.D. Cal. 2003) (involving a challenge based on Fifth, Ninth, and Tenth Amendment rights and the Commerce Clause).

46. *Raich II*, 352 F.3d at 1225. See discussion of the plaintiffs' medical conditions *supra* Part I.

47. Raich's suppliers sued anonymously in order to maintain her supply during the litigation. *Raich II*, 352 F.3d at 1225.

48. *Id.* Although Monson did not testify as to the source of her seeds, the court stated: "the origin of the seeds is too attenuated an issue to form the basis of congressional authority under the Commerce Clause." *Id.* at 1233 n.8.

49. *Id.* at 1225–26. The two agencies were engaged in a "three-hour standoff" before the DEA finally seized Monson's plants, which included intervention on behalf of the Sheriff's Department by both the District Attorney and the United States Attorney. *Raich I*, 248 F. Supp. 2d 918, 921 (N.D. Cal. 2003), *rev'd*, 352 F.3d 1222 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 2909 (2004). See discussion of California's Compassionate Use Act and the federal CSA *supra* Part II.B. California and federal law exist concurrently, and officials under each law act according to their respective mandate. However, the federal government cannot force state authorities to enforce the federal law. *New York v. United States*, 505 U.S. 144, 149 (1992). Rather, the issue is whether federal authorities can constitutionally enforce federal law against the users of medicinal marijuana.

50. *Raich I*, 248 F. Supp. 2d at 921.

51. *Raich II*, 352 F.3d at 1226. The plaintiffs claimed that the CSA was

The District Court for the Northern District of California denied plaintiffs' motions.<sup>52</sup> That court, relying on Ninth Circuit precedent, determined that the plaintiffs had no likelihood of success on the merits of their claim because the Ninth Circuit had consistently upheld the constitutionality of the CSA.<sup>53</sup> The district court disregarded the fact that none of the previous Ninth Circuit cases involved *medical* use of marijuana.<sup>54</sup> The court also did not recognize any intervening Supreme Court decision that undermined existing precedent, as required for a district court to overrule Ninth Circuit precedent.<sup>55</sup> However, while the district court could not issue an injunction once it concluded that the plaintiffs were not likely to succeed on the merits of their claims, it did find that the public interest in the injunction,<sup>56</sup> the likelihood of harm,

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unconstitutional as applied to them under the Commerce Clause, the Tenth Amendment, and the Ninth Amendment. They also claimed that their possession and use should be exempted from the CSA based on a *medical necessity* defense. *Raich I*, 248 F. Supp. 2d at 922–30. The district court found no likelihood of success on any of these claims. *Id.* at 930. The court of appeals considered only the Commerce Clause challenge, and, as such, the other constitutional and CSA claims are outside of the scope of this Casenote. However, it should be noted that the medical necessity defense may, in fact, be available to individuals who are in possession of marijuana for medical purposes. In *United States v. Oakland Cannabis Buyers' Cooperative*, the Supreme Court, in dicta, suggested that the defense would not be available to one in possession. 532 U.S. 483, 494 n.7 (2001). However, the three concurring Justices noted that the holding of the case was narrow and did not reach the issue of whether “the defense might be available to a seriously ill patient for whom there is no alternative means of avoiding starvation or extraordinary suffering . . . .” *Id.* at 501 (Stevens, J., concurring).

52. *Raich I*, 248 F. Supp. 2d at 931.

53. *Id.* at 923–25. The court relied on a series of cases in which the Ninth Circuit upheld the CSA. See *United States v. Tisor*, 96 F.3d 370, 373 (9th Cir. 1996) (holding that the CSA is constitutional after the Supreme Court's decision in *Lopez*); *United States v. Visman*, 919 F.2d 1390, 1393 (9th Cir. 1990) (holding that the CSA is constitutional as applied to possession of marijuana plants with intent to distribute); *United States v. Rodriguez-Camacho*, 468 F.2d 1220, 1221–22 (9th Cir. 1972) (finding congressional findings in CSA regarding negative effects of marijuana controlling, and holding that it is a “matter . . . whose ultimate resolution lies in the legislature”).

54. The court of appeals found this fact compelling. *Raich II*, 352 F.3d at 1227 (“[W]e have upheld the CSA in the face of past Commerce Clause challenges. . . . But none of the cases in which the Ninth Circuit has upheld the CSA on Commerce Clause grounds involved the use, possession, or cultivation of marijuana for medical purposes.” (internal citations omitted)).

55. *Raich I*, 248 F. Supp. 2d at 925. The court dismissed *United States v. Morrison*, 529 U.S. 598 (2000), as insufficient to undermine Ninth Circuit precedent. *Id.* at 925–26; see discussion of *Morrison* *infra*, Part IV.A.

56. *Public interest* is relevant to a court's determination of whether a preliminary injunction should issue in the Ninth Circuit. A court can apply one of two standards: a traditional test or an alternative test. The *traditional test* requires that the movant prove the following: (1) a strong likelihood of success on the merits; (2) that the movant will

and the balance of hardships related to the injunction all weighed heavily in favor of the injunction.<sup>57</sup>

On appeal, the Ninth Circuit reversed the district court and remanded the case for the issuance of the preliminary injunction.<sup>58</sup> The court distinguished the former Ninth Circuit cases upholding the constitutionality of the CSA that the district court relied upon,<sup>59</sup> as “none of the cases in which [we have] upheld the CSA on Commerce Clause grounds involved the use, possession, or cultivation of marijuana for medical purposes.”<sup>60</sup> Reasoning that the activity involved in the case was a *separate and distinct class of activities* from those activities involved in the past cases, the court found itself free to consider the merits of the plaintiffs’ claims.<sup>61</sup>

Upon application of the appropriate test,<sup>62</sup> the court found that the plaintiffs had, in fact, demonstrated a likelihood of success on the merits of their claim.<sup>63</sup> The court also agreed with the district court that the public interest and hardship factors pointed strongly in favor of the plaintiffs, and, therefore, decided that a preliminary injunction should issue.<sup>64</sup> Thus, the Ninth Circuit held that the CSA, as applied to those cultivating or possessing marijuana for medical purposes, is likely an unconstitutional extension of Congress’s commerce power.<sup>65</sup> To understand why, a brief overview of Commerce Clause jurisprudence is helpful.

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suffer irreparable harm; (3) that the balance of hardship favors the applicant; and (4) that the public interest favors the injunction. *Raich II*, 352 F.3d at 1227 (citing *Dollar Rent A Car, Inc. v. Travelers Indem. Co.*, 774 F.2d 1371, 1374 (9th Cir. 1985)). The *alternate test* requires that the movant prove either: (1) probable success on the merits and possibility of irreparable injury; or (2) that serious questions are raised and that the balance of hardships tips in his favor. *Raich II*, 352 F.3d at 1227 (citing *First Brands Corp. v. Fred Meyer, Inc.*, 809 F.2d 1378, 1381 (9th Cir. 1987)).

57. The interest of the people of California in allowing ill people to possess and use marijuana is clear, as expressed in the Compassionate Use Act. The court also found that the plaintiffs would suffer severe harm if the CSA were enforced against them. *Raich I*, 248 F. Supp. 2d at 930. On the other hand, the federal government’s interests in the presumption of constitutionality of statutes and the FDA drug approval process “wane in comparison with the public interests enumerated by plaintiffs and by the harm that they would suffer if denied medical marijuana.” *Id.* at 931.

58. *Raich II*, 352 F.3d at 1235. See *supra* Part V for a detailed analysis of the Ninth Circuit’s decision.

59. See *supra* note 9 (citing cases).

60. *Raich II*, 352 F.3d at 1227.

61. *Id.* at 1228–29. See discussion of *Morrison* *infra* Part IV.A.

62. See *infra* Part V (analyzing the *Raich* decision).

63. *Raich II*, 352 F.3d at 1234.

64. *Id.* at 1235.

65. *Id.* at 1234.

## IV. OVERVIEW OF THE COMMERCE POWER

The Constitution provides that “Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . . .”<sup>66</sup> The Supreme Court initially interpreted this seemingly broad mandate strictly.<sup>67</sup> Later, however, expansive interpretations led to extensive federal regulation of many aspects of modern life. This regulation extended to those areas that have been traditionally considered the province of state governments, such as criminal law.<sup>68</sup> Indeed, congressional regulation of controlled substances is carried out under the commerce power.<sup>69</sup> Since 1995, however, the Supreme Court has declined to further expand the commerce power, refusing to allow congressional ambitions to go completely unchecked. This section of the Casenote discusses the interpretation of the Commerce Clause in the Supreme Court and recent Ninth Circuit cases that laid the groundwork for *Raich*.

*A. Supreme Court Commerce Clause Jurisprudence*

The interpretation of the commerce power began with *Gibbons v. Ogden*, in which Chief Justice Marshall articulated a broad power to regulate all commercial “intercourse” between states that “is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”<sup>70</sup> Despite this broad language, prior to 1937, the Supreme Court consistently put Congress in check, as it attempted to expand its influence on the states. The Court invalidated regulations seeking to regulate what it considered to be local activity,<sup>71</sup> while allowing regulation in the instances where

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66. U.S. CONST. art. I, § 8, cl. 3.

67. See *infra* Part IV.A.

68. See *United States v. Lopez*, 514 U.S. 549, 564 (1995) (involving the Gun-Free School Zones Act of 1990, making it a federal crime to possess a firearm in the vicinity of a school).

69. See, e.g., 21 U.S.C. § 801 (2000).

70. 22 U.S. (9 Wheat.) 1, 195 (1824) (finding that the state could not grant an exclusive license to operate interstate ferry where the federal government also granted licenses).

71. See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1, 17 (1895) (finding that the regulation of a monopoly in sugar refining was not within the commerce power, as manufacture of goods was not interstate commerce); *Hammer v. Dagenhart*, 247 U.S. 251, 275–76 (1918) (finding that Congress had no power to regulate the use of child labor in the manufacture of goods because manufacturing was considered local activity), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935) (finding that Congress had no power to

goods actually traveled interstate.<sup>72</sup>

Once the country settled into President Roosevelt's New Deal and the President articulated his plan to expand the Supreme Court, the Court became much more amenable to Congressional exertions of power.<sup>73</sup> Between 1937 and 1995, the congressional power under the Commerce Clause went virtually unchecked. The Supreme Court upheld federal authority over those activities that had a "substantial effect" on interstate commerce, interpreted broadly, even if they were purely intrastate.<sup>74</sup> In addition, the Court upheld federal regulation of those areas that were traditionally considered the province of the states, such as criminal law. For example, in *Perez v. United States*, the Court upheld federal prosecution of a loan shark on grounds that loan sharking was frequently tied to organized crime, which in turn affected interstate commerce.<sup>75</sup> All attempts to regulate intrastate activity based on a substantial effect on interstate commerce were upheld between 1937 and 1995.<sup>76</sup>

The most expansive interpretation of the commerce power came in 1943 with *Wickard v. Filburn*,<sup>77</sup> a case that is of particular importance to any analysis of medical marijuana regulation. In *Wickard*, the Supreme Court upheld the application of a federal law forbidding the production of wheat in excess of a quota, despite the fact that the farmer's wheat was grown and milled on his property and was used solely for the

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regulate wages and hours of local poultry producer); *Carter v. Carter Coal Co.*, 298 U.S. 238, 308–09 (1936) (finding that Congress had no power to regulate wages and hours of coal miners because the relationship between company and employees was purely local in nature).

72. See, e.g., *Lottery Case*, 188 U.S. 321, 363 (1903) (upholding the prohibition on interstate sale of lottery tickets); *Hoke & Economides v. United States*, 227 U.S. 308, 322 (1913) (upholding prohibition on interstate trafficking in women).

73. See WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 216 (1995).

74. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act, which regulated wages, hours, and working conditions in all business over a certain size, effectively overruling *Schechter Poultry*); *Darby*, 312 U.S. at 100 (upholding regulation of wages and hours in the manufacture of goods intended for shipment in interstate commerce, overruling *Hammer*); *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding limits on the amount of wheat that a farmer could grow for home consumption because the interstate price was a function of total wheat production); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding the Civil Rights Act as applied to local hotel because discrimination would discourage travel, affecting interstate commerce); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding Civil Rights Act as applied to local restaurant on grounds that segregation in public accommodations affected interstate travel, and many foodstuffs had traveled in interstate commerce); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (upholding federal pollution laws because surface coal mining affects interstate commerce).

75. *Perez v. United States*, 402 U.S. 146, 156–57 (1971).

76. See, e.g., cases cited *supra* note 74.

77. 317 U.S. 111 (1942).

farmer's personal consumption.<sup>78</sup> The court reasoned that because Mr. Filburn would no longer need to purchase wheat on the market, his actions, in combination with others similarly situated, would substantially affect interstate commerce.<sup>79</sup> As later articulated in *Maryland v. Wirtz*,<sup>80</sup> *Wickard*'s aggregation rule became known as the "enterprise concept," standing for the proposition that if a statute regulates an enterprise that is substantially related to interstate commerce, the "*de minimis* character of individual instances arising under that statute is of no consequence."<sup>81</sup> In other words, Congress can lawfully regulate a large industry or enterprise by exercising control over its smaller parts, whether those parts affect interstate commerce or not.<sup>82</sup> Congress reacted to cases like *Wickard*,<sup>83</sup> *Wirtz*,<sup>84</sup> and *Perez*<sup>85</sup> by dramatically expanding federal criminal legislation.<sup>86</sup>

In 1995, the Supreme Court made a striking shift in its Commerce Clause jurisprudence when it invalidated the federal Gun-Free School Zones Act of 1990<sup>87</sup> in *United States v. Lopez*.<sup>88</sup> The court rearticulated that the test to be applied is whether the activity in question "'substantially affects' interstate commerce,"<sup>89</sup> and held that the law at issue was invalid as it "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce."<sup>90</sup> Chief Justice Rehnquist, for the majority, stated:

The broad language in [past] opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude . . . that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.<sup>91</sup>

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78. *Id.* at 127–28.

79. *Id.*

80. 392 U.S. 183 (1968), *overruled by* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976). In *Wirtz*, the Supreme Court held that Congress could regulate labor relations involving a small group of employees because labor-related problems in one group of employees could lead to problems with the entire enterprise, which would affect interstate commerce. *Id.* at 192.

81. *Id.* at 196 n.27.

82. *Id.*

83. 317 U.S. 111.

84. 392 U.S. 183.

85. 402 U.S. 146.

86. Newbern, *supra* note 8, at 1602–05.

87. 18 U.S.C. § 922 (2000). The Gun-Free School Zones Act made it a federal offense for anyone to possess a firearm in a "school zone." *Id.* § 922(q)(2)(A).

88. 514 U.S. 549 (1995).

89. *Id.* at 559.

90. *Id.* at 551.

91. *Id.* at 567–68 (citations omitted). In context, the national/local distinction



The impact of *Lopez* was immediate and dramatic. Within four years, 566 cases arguing Commerce Clause violations were filed in federal courts, with over eighty filed in the first eight months.<sup>92</sup>

In the year 2000, the Supreme Court reaffirmed its new, restrictive position on the commerce power in *United States v. Morrison*.<sup>93</sup> Despite a presumption of constitutionality based on “[d]ue respect for the decisions of a coordinate branch of Government,”<sup>94</sup> the Court struck down the Violence Against Women Act.<sup>95</sup> Notably, the statute at issue contained extensive congressional findings that violence against women affected interstate commerce because it deterred victims from traveling and doing business interstate.<sup>96</sup> However, the Court considered this Congressional finding insufficient, rejecting the argument “that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”<sup>97</sup>

In addition to reaffirming *Lopez*, the *Morrison* court articulated four considerations that are relevant to a Commerce Clause analysis.<sup>98</sup> First, the Court considered whether the activity in question was economic in nature.<sup>99</sup> Second, the Court considered whether the statute in question contained a “jurisdictional element” that may establish a connection with

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merely highlights the basic question: whether the activity substantially affects interstate commerce. *Id.* at 567. The Supreme Court in *NLRB v. Jones & Laughlin Steel Corp.* warned that the commerce power “may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.” 301 U.S. 1, 37 (1937).

92. Newbern, *supra* note 8, at 1607.

93. 529 U.S. 598 (2000).

94. *Id.* at 607.

95. *Id.* at 627. The Violence Against Women Act provided a federal civil remedy for victims of crimes of violence motivated by gender. 42 U.S.C. § 13981 (2000).

96. *Morrison*, 529 U.S. at 615. Justice Souter, writing for the four dissenters, found that the findings were sufficient to support the exercise of Congressional power. *Id.* at 634 (Souter, J., dissenting).

97. *Id.* at 617 (emphasis added). While this language seems to flatly contradict *Wickard* and reject the aggregation rule, the *Morrison* court did not overrule that case. Instead, the majority distinguished the activity in *Wickard* as “economic,” *id.* at 610, while the activity in question in *Morrison* was “noneconomic.” *Id.* at 617.

98. *Id.* at 610–13.

99. *Id.* at 610. The court reasoned that “a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision . . .” *Id.* The Court stated: “Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.” *Id.* at 613. This economic/noneconomic distinction has resulted in the criticism that it is unworkable. See Jesse H. Choper, *Taming Congress’s Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 ARK. L. REV. 731, 737–43 (2003). As discussed below, this distinction provides no real guidance to courts, as the way in which one defines the class of activities involved in a case determines whether it is economic or noneconomic, commercial or noncommercial. See *infra* Parts IV.B, V.

interstate commerce.<sup>100</sup> Third, the Court stated that the legislative history was relevant to a Commerce Clause analysis, in order to aid the court in evaluating the effect on interstate commerce, when it was not readily apparent.<sup>101</sup> However, “the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.”<sup>102</sup> Finally, the fourth factor articulated by the Court was whether the link between the activity and the effect on interstate commerce was “attenuated.”<sup>103</sup> Whether an effect is “attenuated” is not defined by a clear test or standard, and, therefore, this fourth factor has become the most important in any Commerce Clause analysis.<sup>104</sup>

The willingness on the part of the Supreme Court to limit Congressional power under the Commerce Clause, as articulated in *Lopez* and *Morrison*, has led the notoriously liberal Ninth Circuit to issue several recent decisions that place similar limits on the reach of Congress.<sup>105</sup>

### *B. Ninth Circuit Commerce Clause Jurisprudence Following Morrison*

In three recent cases, the Ninth Circuit has applied the *Lopez* and *Morrison* analysis to possession of child pornography,<sup>106</sup> machine guns,<sup>107</sup> and medical marijuana.<sup>108</sup> In each of these cases, the activity in question was not clearly economic or noneconomic in nature. Despite this ambiguity, the court in each case *defined* the activity as noneconomic<sup>109</sup> and, therefore, found the connection to interstate commerce too attenuated to justify the exercise of congressional power.<sup>110</sup>

In *United States v. McCoy*, the Ninth Circuit held that a federal statute

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100. *Morrison*, 529 U.S. at 611–12. The statute in question did not contain any jurisdictional element. *Id.* at 613.

101. *Id.* at 612.

102. *Id.* at 614.

103. *Id.* at 612. In the case of the Violence Against Women Act, there were ample congressional findings. However, the findings involved a causal chain that did not support a finding of “substantial effects.” *Id.* at 615.

104. *See infra* Parts IV.B, V.

105. *See infra* Parts IV.B, V; *see also supra* note 15 (discussing the issue of political ideology and federalism).

106. *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003).

107. *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003).

108. *Raich II*, 352 F.3d 1222 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 2909 (2004).

109. *McCoy*, 323 F.3d at 1131; *Stewart*, 348 F.3d at 1138; *Raich II*, 352 F.3d at 1228.

110. *McCoy*, 323 F.3d at 1133; *Stewart*, 348 F.3d at 1138; *Raich II*, 352 F.3d at 1233.

prohibiting the possession of child pornography was unconstitutional as it applied to “simple intrastate possession of a visual depiction (or depictions) that has not been mailed, shipped, or transported interstate and is not intended for interstate distribution.”<sup>111</sup> The court explicitly limited its holding to that narrowly defined class of activities, avoiding the enterprise concept by reasoning that the activity in question was not merely “idiosyncratic facts of an individual instance of *de minimis* character.”<sup>112</sup>

Applying the four-part *Morrison* test, the court found first that the activity in question differed from the activity in *Wickard*, and, as such, it was sufficiently noneconomic.<sup>113</sup> The court also dismissed the *attenuation* factor because it saw no relationship, “attenuated or otherwise, between the regulated activity and interstate commerce.”<sup>114</sup>

The remaining two *Morrison* factors were more complicated. The statute at issue in *McCoy* did contain an express “jurisdictional hook” that was intended by Congress to satisfy Commerce Clause concerns.<sup>115</sup> However, the court readily dismissed this because it “not only fails to limit the reach of the statute to any category or categories of cases that have a particular effect on interstate commerce, but . . . it encompasses virtually *every* case imaginable . . . .”<sup>116</sup> In other words, a jurisdictional limitation is meaningless if it does not actually limit the application of the statute to that which affects interstate commerce.

Finally, the *McCoy* court addressed the existence of legislative findings relating to the affect on interstate commerce.<sup>117</sup> In *Morrison*, the availability of more extensive and more specific findings were not sufficient for the Supreme Court to find the statute constitutional. Likewise, the *McCoy* court did not hesitate to dismiss the legislative

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111. *McCoy*, 323 F.3d at 1133.

112. *Id.* at 1132. See discussion *supra* Part IV.A.

113. Whereas *Filburn*’s wheat was intended to replace an item in interstate commerce, the photo at issue in *McCoy* was not intended for any kind of economic or commercial uses. *McCoy*, 323 F.3d at 1122. The court dismissed the reasoning of the Third Circuit in a similar case, which held the same activity to be economic in nature based on an “addiction theory” as “creative speculation.” *Id.* at 1121. In *United States v. Rodia*, 194 F.3d 465, 477 (3d Cir. 1999), the court reasoned that Congress could have concluded that purely home-based possession of child pornography would lead to an increased demand on the part of the possessor, thus causing the person to engage in economic activity that would affect interstate commerce. *McCoy*, 323 F.3d at 1121.

114. *McCoy*, 323 F.3d at 1124.

115. *Id.* The statute was limited to pornography in which the paper, film, or cameras used had traveled in interstate commerce. *Id.* at 1125.

116. *Id.* at 1124.

117. *Id.* at 1126–28. Unlike the statute at issue in *Morrison*, Congress had not made findings specifically linking noncommercial intrastate activity to interstate commerce. Instead, the findings present in the legislative history involved only general conclusions regarding the pornography industry. *Id.* at 1127.

findings as giving no support to the federal assertion of power over the “simple intrastate possession” of a “home-grown” picture of a child.<sup>118</sup>

Relying on *Lopez*, *Morrison*, and *McCoy*, the Ninth Circuit decided *United States v. Stewart* in November 2003.<sup>119</sup> In *Stewart*, the court overturned a conviction for possession of firearms because the connection with interstate commerce was too attenuated.<sup>120</sup> The only tangible connection to interstate commerce was the travel of unusable parts of the guns in question. Because “[a]t some level, of course, everything we own is composed of something that once traveled in commerce,”<sup>121</sup> the court refused to find that the defendant had used the channels of interstate commerce,<sup>122</sup> and instead engaged in a *Morrison* analysis of whether the activity “substantially affected” interstate commerce.<sup>123</sup>

Applying the *Morrison* test to the statute at issue in *Stewart*, Judge Kozinski deemed the first and fourth factors<sup>124</sup> “the most important”<sup>125</sup> and found that the possession of a machine gun was not economic in nature and that any effect on interstate commerce was attenuated.<sup>126</sup> The dissent would have categorized Stewart’s possession of his homemade machine gun as part of a larger general class of activity (any possession of machine guns), and would have held that this general class of activity interfered with the interstate trafficking in machine guns, thereby clearly affecting interstate commerce.<sup>127</sup> However, the majority chose to narrowly categorize Stewart’s possession of his homemade gun. Judge Kozinski

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118. *Id.* at 1129.

119. 348 F.3d 1132 (9th Cir. 2003).

120. *Id.* at 1137.

121. *Id.* at 1135.

122. *Id.* *Lopez* identified three categories of activities over which Congressional Commerce power extends: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) that which has a substantial relation to interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

123. *Stewart*, 348 F.3d at 1136.

124. The first *Morrison* factor is whether the regulation attempts to regulate activity that is *economic* in nature. The fourth factor is the effect on interstate commerce. *United States v. Morrison*, 529 U.S. 598, 610–13 (2000).

125. *Stewart*, 348 F.3d at 1137 (citing *United States v. McCoy*, 323 F.3d 1114, 1119 (9th Cir. 2003)).

126. *Stewart*, 348 F.3d at 1137–38. The court also stated that the other two *Morrison* factors led to the conclusion that the statute was unconstitutional as applied. The statute contained no jurisdictional element, and “[n]othing in the legislative history suggest[ed] that Congress ever considered the impact of purely intrastate possession of homemade machine guns on interstate commerce . . . .” *Id.* at 1138–40.

127. *Id.* at 1143 (Restani, J., concurring in part, dissenting in part).

reasoned that possession of a gun by a person who would not otherwise purchase such a gun, composed of legally available parts, assembled at home, and not intended for sale, was not commercial in nature and did not sufficiently affect interstate commerce.<sup>128</sup> Therefore, by narrowly classifying Stewart's activity, the court found that the statute, as applied to Stewart's activity, was an impermissible extension of the commerce power.<sup>129</sup>

Related to the issue of a narrow classification, the *Stewart* court also addressed the issue of whether an "as applied" Commerce Clause challenge was appropriate.<sup>130</sup> By narrowly classifying the activity in question, a court risks running afoul of the enterprise concept articulated in *Wirtz*.<sup>131</sup> If a statute regulates a large enterprise that affects interstate commerce, the "*de minimis* character of individual instances arising under that statute is of no consequence."<sup>132</sup> Potentially, this concept could limit "as applied" challenges under the Commerce Clause, depending on how the activity is defined. However, Judge Kozinski avoided the impact of this rule by reasoning that the issue only arises when the *individual instances* could affect a large enterprise that could interfere with interstate commerce.<sup>133</sup> Stewart's possession, as narrowly defined by the majority, was not part of a larger enterprise, and, therefore, the enterprise concept did not affect the case.<sup>134</sup>

It is in light of these cases that a panel of the Ninth Circuit decided *Raich v. Ashcroft*.

## V. ANALYSIS OF *RAICH*

As demonstrated in the preceding section, the way a court defines the activity in question in a case affects both the *Morrison* four-factor analysis and the validity of the "as applied" challenge. In *Raich*, the Ninth Circuit defines the activity in question as "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician."<sup>135</sup>

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128. *Id.* at 1138.

129. *Id.*

130. *Id.* at 1140–41.

131. *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968), *overruled by* *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).

132. *Id.* This issue was not relevant to *Lopez* or *Morrison*, as both involved challenges to each statute on its face. *See* *United States v. Lopez*, 514 U.S. 549, 551 (1995); *United States v. Morrison*, 529 U.S. 598, 601–02 (2000). However, *McCoy* was an "as applied" challenge, and the dissent challenged the issue in that case. *See* *United States v. McCoy*, 323 F.3d 1114, 1133–34 (9th Cir. 2003) (Trott, J., dissenting).

133. *Stewart*, 348 F.3d at 1141.

134. *Id.*

135. *Raich II*, 352 F.3d 1222, 1228 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 2909

While Judge Beam in dissent quarreled with the use of “noncommercial” in the definition of the class of activities, he took no issue with the majority defining possession and use of marijuana for medical purposes as a separate class of activities.<sup>136</sup> The majority proffered three grounds for its conclusion.<sup>137</sup> First, because of the involvement of a physician, the concern regarding the user’s health is significantly different.<sup>138</sup> Second, marijuana prescribed by a physician does not contribute to the spread of *drug abuse*.<sup>139</sup> Finally, marijuana for medicinal use is distinct insofar as it is not intended for distribution.<sup>140</sup>

It is a matter of simple logic to conclude that possession of marijuana for medical use is a distinct class of activity from use and possession of marijuana with the intent to distribute it. In addition, as a matter of common usage, *medical marijuana* is a distinct class of activities, as demonstrated by the nine states that have passed statutes similar to the Compassionate Use Act and the fact that the majority of American adults support legalization of medical marijuana.<sup>141</sup>

Once it had defined the class of activity in question, the *Raich* court applied the *Morrison* test to the CSA as it applied to the Plaintiffs.

#### A. The “Substantial Effects” Test

Applying the four *Morrison* factors<sup>142</sup> to “the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician,”<sup>143</sup> the Ninth Circuit found that the CSA, as applied to the plaintiffs, was likely unconstitutional, and therefore the requested injunction should issue.<sup>144</sup> In analyzing the first *Morrison* factor—whether the statute regulates commerce or an

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(2004).

136. *Id.* at 1239.

137. *Id.* at 1228.

138. *Id.*

139. *Id.*

140. *Id.*

141. *See, e.g.,* Stein et al., *supra* note 9, at 57 (citing a Time/CNN poll showing that eighty percent of adults favor legalization). The Compassionate Use Act specifically provides that it does not override legislation relating to nonmedical use of marijuana, or use that “endangers others.” CAL. HEALTH & SAFETY CODE § 11362.5(b)(2) (West Supp. 2004).

142. The court reiterated that the first and fourth factors are the most important. *Raich II*, 352 F.3d at 1229 (citing *United States v. McCoy*, 323 F.3d 1114, 1119 (9th Cir. 2003)).

143. *Raich II*, 352 F.3d at 1228.

144. *Id.* at 1235.

economic enterprise—the court admitted that “[c]learly, the way in which the activity or class of activities is defined is critical.”<sup>145</sup> The majority reasoned that the class of activities in question (medical use of marijuana) was not in any way commercial.<sup>146</sup>

Defining the activity as the court did was essential to this conclusion.<sup>147</sup> By limiting its analysis to medicinal marijuana, the court found that “[l]acking sale, exchange, or distribution, the activity does not possess the essential elements of commerce.”<sup>148</sup> Like the dissent in *Stewart*, the dissent in *Raich* would have defined the class of activities more generally, as part of an enterprise involving a product that is fungible, “for which there is a well-established and variable interstate market.”<sup>149</sup> As such, the dissent would have found *Wickard* controlling.<sup>150</sup> While wheat and marijuana seem, on the surface, to be interchangeable for purposes of the *Morrison* analysis, the court correctly noted that the difference lay in whether or not the activity was commercial or economic.<sup>151</sup> While activities related to the sale of marijuana were clearly commercial, the majority considered the possession and use of medical marijuana “a separate and distinct class of activities.”<sup>152</sup>

The court properly and easily dismissed the second *Morrison* factor: the CSA contains no jurisdictional element that would limit its application.<sup>153</sup>

The court rightly admitted that the third *Morrison* factor, the presence of congressional findings regarding the effects of the regulated activity on interstate commerce, weighed in favor of a finding of the CSA’s constitutionality.<sup>154</sup> In enacting the CSA, Congress did make specific findings regarding the effect of the drug trade on interstate commerce, which are embodied in the statute itself.<sup>155</sup> However, as the Supreme Court stated in *Morrison*, “the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.”<sup>156</sup> The *Raich* court also noted that “there is no indication that Congress was considering anything like the class of activities at

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145. *Id.* at 1228.

146. *Id.* at 1229–30.

147. *See id.* at 1239 (Beam, J., dissenting) (“I respectfully disagree with the court’s insertion of the term ‘noncommercial’ into the class definition . . .”).

148. *Id.* at 1229–30.

149. *Id.* at 1239 (Beam, J., dissenting).

150. *Id.* at 1238 (Beam, J., dissenting) (arguing that the conduct at issue is “entirely indistinguishable from that of Mr. Filburn’s”).

151. *Id.* at 1230.

152. *Id.* at 1228.

153. *Id.* at 1231.

154. *Id.* at 1232.

155. *See infra* Part II.B.

156. *United States v. Morrison*, 529 U.S. 598, 614 (2000).

issue here when it made its findings.”<sup>157</sup> This is likely correct, due to the fact that the federal government had a medical marijuana program in place at the time the CSA was passed.<sup>158</sup> While this factor did weigh in favor of constitutionality, the court reiterated that it was not controlling, and that the first and fourth factors were most significant.<sup>159</sup>

Finally, the *Raich* court examined the fourth *Morrison* factor—whether the link between the activity and a substantial effect on interstate commerce is attenuated.<sup>160</sup> While the court admitted that the cultivation and possession of medical marijuana could, conceivably, affect interstate commerce in some way, it was “far from clear that such an effect would be substantial.”<sup>161</sup> As Judge Kozinski stated in his concurring opinion to *Conant v. Walters*, “[m]edical marijuana, when grown locally for personal consumption, does not have any direct or obvious effect on interstate commerce.”<sup>162</sup> The *Raich* dissent argued that because marijuana was a *readily marketable economic commodity*, this case was distinguishable from both *McCoy* and *Stewart*, which both held that the link was too attenuated.<sup>163</sup> The dissent seemed to ignore the fact that both child pornography and machine guns are, in fact, readily marketable economic commodities.<sup>164</sup> The mere fact that a commodity is readily marketable does not necessarily lead to the conclusion that, in certain classes of activity involving that commodity, there is a link between that activity and interstate commerce.

The majority’s definition of the class of activity in question in *Raich* determined the outcome of the *Morrison* analysis. Likewise, it enabled the majority to entertain the “as applied” challenge, despite the enterprise concept.

### B. The “As Applied” Commerce Clause Challenge

The enterprise concept, as discussed above, limits the court’s power to overturn a statute in a particular case when the statute constitutionally

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157. *Raich II*, 352 F.3d at 1232.

158. *See supra* note 35 and accompanying text.

159. *Raich II*, 352 F.3d at 1232–33.

160. *Id.* at 1233.

161. *Id.*

162. *Conant v. Walters*, 309 F.3d 629, 647 (9th Cir. 2002) (Kozinski, J., concurring), *cert. denied*, 124 S. Ct. 387 (2003).

163. *Raich II*, 352 F.3d at 1242–43 (Beam, J., dissenting).

164. *See United States v. McCoy*, 323 F.3d 1114, 1119–20 (9th Cir. 2003); *United States v. Stewart*, 348 F.3d 1132, 1139 (9th Cir. 2003).



regulates the *class of activities* involved.<sup>165</sup> Thus, the major hurdle in *Raich* was to distinguish the class of activities involved from those involved in past cases in which the Ninth Circuit had upheld the CSA as applied to marijuana possession.<sup>166</sup> The court had held the CSA constitutional in those cases. Therefore, if the majority were to define the activity in *Raich* as part of that general class of activity (or larger enterprise), the plaintiffs' conduct would be "de minimis," and the enterprise concept would preclude a finding for the plaintiffs.

The cases in which the Ninth Circuit upheld the CSA are distinguishable from *Raich* in that they all involved some level of distributive intent.<sup>167</sup> Therefore, the court's narrow definition of both the activities at issue in *Raich* and the activities involved in past cases allowed the court to avoid the enterprise concept.<sup>168</sup> The past cases, according to the majority, involved the CSA as applied to drug *trafficking*. In contrast, *Raich* and *Monson's* activity was "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician . . . ."<sup>169</sup> This activity represented a "substantial portion" of the activity regulated by the federal CSA, and, after *McCoy* it is, therefore, a separate and distinct class of activities.<sup>170</sup>

## VI. RECOMMENDATIONS

The Supreme Court should affirm the Ninth Circuit's decision. In the

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165. "[W]here a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *United States v. Lopez*, 514 U.S. 549, 558 (1995) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968), *overruled by* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976)); *see Raich II*, 352 F.3d at 1228 (quoting *United States v. Visman*, 919 F.2d 1390, 1393 (9th Cir. 1990)). The Supreme Court articulated the "class of activities" language in *Perez v. United States*, 402 U.S. 146, 154 (1971).

166. The district court relied on these past cases to deny the plaintiff's request for an injunction. *Raich I*, 248 F. Supp. 2d 918, 925–26 (N.D. Cal. 2003), *rev'd*, 352 F.3d 1222 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 2909 (2004).

167. *See United States v. Rodriguez-Camacho*, 468 F.2d 1220, 1221 (9th Cir. 1972) (involving intrastate *distribution*); *Visman*, 919 F.2d at 1392 (involving defendant who admitted to plan to "split the proceeds" with his brother); *United States v. Tisor*, 96 F.3d 370, 372–73 (9th Cir. 1996) (involving intrastate drug *trafficking*); *United States v. Kim*, 94 F.3d 1247, 1248 (9th Cir. 1996) (involving guilty plea to the charge of possession with intent to distribute).

168. *Raich II*, 352 F.3d at 1228–29.

169. *Id.* at 1228.

170. *Id.* at 1229. The court reasoned that use and possession of marijuana for medical purposes was a "substantial portion" of the activity regulated by the CSA because at the time of the decision, Alaska, Arizona, California, Colorado, Hawaii, Maine, Nevada, Oregon, and Washington had passed laws permitting it. *Id.*; *see* discussion of *McCoy*, *supra* Part IV.B; *see also County of Santa Cruz v. Ashcroft*, 279 F. Supp. 2d 1192 (N.D. Cal. 2003) (applying the *Morrison* test to a Commerce Clause challenge of the CSA as applied to medicinal marijuana after *McCoy*).

interim, the Ninth Circuit and other courts of appeals should continue to apply the reasoning of *Raich* and narrowly define the classes of activities involved in Commerce Clause challenges.

Adopting a narrow definition of the class of activities is appropriate for two reasons. First, it is appropriate for the courts to limit the power of the federal government under the Commerce Clause. Our country has a dual system of government, in which the limitations on the reach of the federal government protect individual freedoms. James Madison wrote: “In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.”<sup>171</sup> This *security* of rights requires that the federal government remain limited, as the Framers intended.<sup>172</sup> However, since the New Deal, the federal government has continued to expand. It now exerts power over most aspects of everyday life, including those areas traditionally left to the people or regulated by the states, such as criminal law.<sup>173</sup> The states, where individual citizens have more power to control the laws that govern them, are left with the Constitution, which, until recently, has provided very little protection against the assertions of federal authority.<sup>174</sup> It is the role of the judiciary, perhaps even its duty, to intervene. As Justice Kennedy stated, “the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.”<sup>175</sup>

Second, limiting federal commerce power by narrowly defining the class of activities is within the discretion of the courts. The Supreme Court’s decisions in *Lopez* and *Morrison* leave lower courts with a significant amount of leeway, as the definition of the activity involved in any given case necessarily determines the outcome. Indeed, the Supreme Court itself has acknowledged this flexibility, noting in *Lopez* that the nature of an activity as “commercial” or “noncommercial” “may in

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171. THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

172. U.S. CONST. amend. IX; U.S. CONST. amend. X.

173. See *United States v. Lopez*, 514 U.S. 549, 564 (1995) (striking down Congressional attempts to criminalize possession of handguns in school zones).

174. See *supra* Part IV.B (discussing Ninth Circuit commerce clause jurisprudence following *Morrison*).

175. *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring).

some cases result in legal uncertainty.”<sup>176</sup> However, while commentators may criticize this uncertainty,<sup>177</sup> the Court does not apologize for its articulated test: “[S]o long as Congress’ [sic] authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause will always engender ‘legal uncertainty.’”<sup>178</sup>

## VII. CONCLUSION

Citizens of nine states have taken the issue of providing relief to the suffering very seriously, and have devised solutions to this problem. Despite the clear will of the people in these states,<sup>179</sup> the federal government has insisted on enforcing the CSA against people suffering from debilitating diseases, such as Diane Monson.<sup>180</sup> The CSA exemplifies a major problem in modern society, in which the federal government disregards the limits placed upon it by the Constitution.

The *Raich* decision rightly ensured the effectiveness of the Compassionate Use Act and other state laws that legalize medical marijuana. However, the impact of *Raich* extends far beyond the issue of medical marijuana. With *Lopez* and *Morrison*, the Supreme Court indicated its willingness to enforce these constitutional limits on federal power. Congressional powers are enumerated and limited, and Congress has continuously exceeded the power granted to it in the Constitution. Courts must take a firm stance against this abuse.

In Commerce Clause cases, no federal regulation should be upheld unless the *narrowly defined* class of activities that it purports to regulate substantially affects interstate commerce. Especially in the area of criminal law, the courts must not “pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”<sup>181</sup> With *McCoy*, *Stewart*, and *Raich*, the Ninth Circuit has

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176. *Id.* at 566.

177. *See* Choper, *supra* note 99, at 735.

178. *Lopez*, 514 U.S. at 566.

179. A recent poll shows that support for medical marijuana among California voters has become stronger since the Compassionate Use Act was passed. While only 39% of voters think that marijuana should be totally legalized, 74% support the right of severely ill people to use the drug for medical purposes. Of those polled, 63% of self-identified Republicans, 53% of conservatives, 78% of moderates, and 92% of liberals support the law. Of those voters over sixty-five years of age, 59% support it. Bob Egelko, *Medical Pot Law Gains Acceptance: Prop. 215 Polls Better Now Than When It Passed*, S.F. CHRON., Jan. 30, 2004, at A1.

180. *See supra* note 9 (citing medical marijuana cases).

181. *Lopez*, 514 U.S. at 567.

properly and necessarily limited Congress's reach, ensuring that the fundamental principles of federalism are alive and well. The Supreme Court should affirm this decision.

SAMANTHA EVERETT

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